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15 WARNER BROS. RECORDS INC.,

16 ATLANTIC RECORDING CORPORATION, ELEKTRA

17 ENTERTAINMENT GROUP INC., and RHINO

18 ENTERTAINMENT COMPANY

19 Additional counsel and parties on signature page

20 UNITED STATES BANKRUPTCY COURT

21 NORTHERN DISTRICT OF CALIFORNIA

22 SAN JOSE DIVISION

23 In re

24 SEEQPOD, INC.,

25 Debtor.

Case No. 5:09-52226-RLE

Adv. No. 09-05095

Chapter 11

Honorable Roger L. Efremsky

**MOTION TO COMPEL
EXAMINATION UNDER
BANKRUPTCY RULE 2004**

Date: March 24, 2010

Time: 11:30 a.m.

Ctrm: 3099

280 South First Street
San Jose, CA 95113

26 Warner Bros. Records Inc., Atlantic Recording Corporation, Elektra Entertainment Group
27 Inc., Rhino Entertainment Company (collectively, "WMG") and Capitol Records, LLC, Caroline
28 Records, Inc., Virgin Records America, Inc., Colgems-EMI Music Inc., EMI April Music Inc.,
EMI Blackwood Music, EMI Feist Catalog Inc., EMI Full Keel Music, EMI Golden Torch Music
Corp., EMI Gold Horizon Music Corp., EMI Grove Park Music, Inc., EMI Longitude Music,

MOTION TO COMPEL 2004
EXAMINATION

1 EMI Miller Catalog Inc., EMI Robbins Catalog Inc., EMI U Catalog, Inc., EMI Virgin Music,
2 Inc., EMI Virgin Songs, Inc., EMI Waterford Music, Inc., Jobete Music Co. Inc., Screen Gems-
3 EMI Music Inc., and Stone Diamond Music (collectively, "EMI") hereby move the Court for an
4 order compelling Mr. Kasian Franks to comply with the previously issued order and subpoena
5 directing the examination of Mr. Franks under Rule 2004 of the Federal Rules of Bankruptcy
6 Procedure (the "2004 Order"). This motion is made pursuant to Local Bankruptcy Rule 2004-
7 1(b), and Civil Local Rules 37-1 and 37-2 as incorporated by Local Bankruptcy Rules 1001-
8 2(a)(48) and (49).

9 Movants have been attempting to take the 2004 examination of Kasian Franks, a principal
10 of the debtor, since August of last year, but have been unable to do so. Despite numerous efforts
11 to meet and confer in good faith with Mr. Franks and his counsel, Movants have been unable to
12 even set dates for the production of documents or the deposition of Mr. Franks. Movants believe
13 that further efforts would be equally fruitless and therefore move this Court for an order:

14 (1) Compelling Kasian Franks to produce the documents requested in the 2004 Order
15 on or before 5:00 p.m. (prevailing Pacific Time) on March 29, 2010 at the offices of Munger,
16 Tolles & Olson, LLP, 560 Mission Street, 27th Floor, San Francisco, CA 94105-2907.

17 (2) Compelling Kasian Franks to submit to a deposition on April 12, 2010 at the
18 offices of Munger, Tolles & Olson, LLP, 560 Mission Street, 27th Floor, San Francisco, CA
19 94105-2907, commencing at 9:00 a.m.

20 Dated: March 11, 2010

Respectfully submitted,

21 MUNGER, TOLLES & OLSON LLP
22 GLENN D. POMERANTZ
23 KELLY M. KLAUS
24 BLANCA F. YOUNG
25 SETH GOLDMAN

By: /s/ Seth Goldman
26 SETH GOLDMAN

Attorneys for WMG

27 *[Signatures Continued on Next Page]*
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1 SeeqPod and that Franks was still heavily involved in SeeqPod's affairs. These reports and
2 information also insinuated that Franks not only has possession of SeeqPod's assets but that he
3 was poised to sell or otherwise use those assets for his own personal gain without oversight from
4 this Court or by the trustee.

5 At the Court's suggestion, Movants applied for an order requiring Franks to produce
6 documents and to appear for examination pursuant to Bankruptcy Rule 2004. The Court granted
7 that motion on July 17, 2009 (Docket No. 68). Movants issued a subpoena pursuant to that order
8 that was served on Franks on July 24, 2009 (Docket No. 72). The subpoena required the
9 production of documents by August 3, 2009 and a deposition on August 23, 2009. Although no
10 motion to quash was filed and no responses or objections were served, Mr. Franks did not
11 produce documents by August 3, 2009.

12 Movants subsequently met and conferred in good faith with Mr. Greg Charles of Campeau
13 Goodsell Smith, counsel to Mr. Franks, numerous times but those efforts have not resulted in
14 compliance by Mr. Franks. Initially, Movants postponed the date for Mr. Franks' examination
15 until September 3, 2009 to accommodate his counsel's vacation schedule, and then had to
16 postpone it further because Mr. Franks failed to produce documents needed to prepare for his
17 examination. By September 1, 2009, Mr. Franks had not produced any documents. Accordingly,
18 Movants sent a letter to Mr. Charles dated September 1, 2009 advising that they would have to
19 postpone the deposition so that they could have time to review any relevant documents. In that
20 letter, Movants asked Mr. Charles to provide new dates for the production of documents and Mr.
21 Franks' examination. (See Ex. B to of Young Decl.) To accommodate confidentiality concerns
22 raised by Mr. Charles, Movants sought and obtained a stipulated order making the 2004
23 examination subject to the protective order in place in Adversary Proceeding No. 09-05095.
24 (Docket No. 74.) Furthermore, without waiving the argument that the deadline to move to quash
25 the subpoena had passed, Movants asked Mr. Charles to provide a letter describing any concerns
26 with the scope of the 2004 examination. Notwithstanding these accommodations, no documents
27 were produced, no dates were proposed for production or a deposition, no response or objection
28 was served to the subpoena, and no letter was provided raising any such objections or concerns.

1 Movants recently renewed their efforts to meet and confer with Mr. Charles when news
2 articles surfaced in February of 2010 reporting that Franks intends to launch a new internet music
3 venture called “Mimvi” that apparently relies on the same technology that SeeqPod used. (See
4 Ex. C to of Young Decl.) Franks’ apparent plan to use core technology owned by the estate to
5 perpetuate further infringements of Movants’ intellectual property rights would violate the
6 automatic stay, interfere with the chapter 7 trustee’s administration of the estate, and make a sham
7 out of the bankruptcy process. Franks’ possession of this technology may also be the result of
8 fraudulent transfer, or a postpetition transfer in violation of 11 U.S.C. § 549 and the stipulated
9 order in this adversary proceeding (entered on April 13, 2009, Docket No. 36) that prohibits the
10 distribution of SeeqPod’s search technology. Furthermore, Franks’ conduct may adversely affect
11 the prospect of, or the value that may be realized from, a sale of SeeqPod’s assets by the
12 bankruptcy estate.

13 To address these concerns, Movants renewed their efforts to obtain Mr. Franks’
14 compliance with the subpoena. Movants wrote to Mr. Charles by letter dated February 15, 2010
15 requesting Mr. Franks’ compliance with the 2004 subpoena and emphasizing that Movants would
16 bring any continued non-compliance to the Court’s attention.. (See Ex. D to Young Decl.) Mr.
17 Charles conferred with counsel to WMG on February 19, 2010 and stated that he had requested
18 dates from Mr. Franks for a deposition and document productions, but had not received those
19 dates from Mr. Franks. Having not received further information from Mr. Charles, Movants
20 again wrote to him on March 3, 2010 to ask for dates and to inform him that Movants’ intended to
21 move to compel if Mr. Franks continued to be non-responsive. (See Ex. E to Young Decl.) As of
22 the filing of this Motion, no response has been provided and no dates have been proposed for
23 productions or a deposition.

24 **III. COMPLIANCE WITH THE 2004 ORDER IS NECESSARY AND APPROPRIATE**

25 Movants, as creditors of the estate and intellectual property owners, continue to be gravely
26 concerned about the apparent misuse, and contemplated misuse, of estate property by Franks and
27 others to the detriment of creditors of the Debtor. In light of recent events and Mr. Franks’ utter
28 lack of compliance with the 2004 Order, Movants respectfully request the Court’s intervention to

1 compel Mr. Franks to comply with the 2004 Order.

2 Local Bankruptcy Rule 2004-1(b) provides that any disputes with respect to orders
3 granting applications for examinations under Rule 2004 “shall be treated as a discovery
4 dispute . . .” Accordingly, the local bankruptcy rules incorporating Civil Local Rules 37-1 and
5 37-2 apply to efforts to compel compliance with the 2004 Order. Those rules require that counsel
6 confer in good faith to resolve any dispute before seeking court intervention, and to detail the
7 objections and responses to discovery requests and the basis for the moving party’s entitlement to
8 the requested discovery. Civil L.R. 37-1, 37-2. Movants easily satisfy these requirements.

9 First, Movants have conferred in good faith, but without success, to obtain Franks’
10 cooperation. Movants have provided Franks more than an adequate number of chances, and each
11 time Franks has demonstrated his steadfast refusal to comply with the subpoena and this Court’s
12 order. In August 2009, Franks disregarded completely the subpoena issued pursuant to the
13 Court’s order. Then, in September 2009, Movants conferred with his counsel and gave Franks a
14 second opportunity to respond. Again, Franks disregarded the subpoena and this Court’s order.
15 Finally, in February 2010, Movants gave Franks a third chance to cooperate, and for the third
16 time he flouted the subpoena and this Court’s order. In sum, Franks has knowingly and
17 intentionally ignored this Court’s order on numerous occasions and made clear that he will not
18 comply without further Court order.

19 Second, Movants’ entitlement to examine Franks is beyond rational dispute. In the first
20 place, Franks has not moved to quash the subpoena or otherwise object to it. Movants’
21 entitlement is therefore not disputed by Franks. Moreover, the reasons that gave rise to the
22 Court’s suggestion, and Movants’ request, to examine Franks are as compelling today as they
23 were in July 2009, if not more so. The estate has not sold its assets yet, Franks continues to act
24 publicly like he possesses SeeqPod technology, and serious concerns persist that Franks has
25 obtained that technology in violation of fraudulent transfer law or the orders of this Court. The
26 recent reports of a copy-cat venture only further heighten these concerns. Examining Franks on
27 his dealings with SeeqPod and the potential misuse of its assets are core and routine areas of
28 examination under Rule 2004 as they relate directly to the administration of the bankruptcy estate

1 and maximizing creditor recoveries. It would therefore benefit the estate, as well as vindicate this
2 Court's authority, for the Court to compel Franks' compliance with the 2004 Order.

3 Movants submit that based on this record, they easily satisfy the requirements to bring a
4 motion to compel and respectfully submit that it is appropriate and necessary for the Court to
5 intervene and compel compliance with the 2004 Order.

6 **RESERVATION OF RIGHTS**

7 Movants reserve the right to move for sanctions against Mr. Franks (or his counsel) and to
8 further move to compel compliance with the 2004 Order as necessary.

9 **NOTICE**

10 Movants are serving this motion on Mr. Greg Charles, counsel for Mr. Franks, the chapter
11 7 trustee, and counsel to the chapter 7 trustee. As a precaution, Movants are also serving Mr.
12 Franks at his last known address in case Mr. Charles no longer represents Mr. Franks.

13 **CONCLUSION**

14 For the reasons set forth above, WMG and EMI respectfully request entry of an order,
15 (1) compelling Kasian Franks to comply with the previously issued subpoena and produce the
16 documents requested therein on or before 5:00 p.m. (prevailing Pacific Time) on March 29, 2010
17 at the offices of Munger, Tolles & Olson, LLP, 560 Mission Street, 27th Floor, San Francisco, CA
18 94105-2907; and (2) compelling Kasian Franks to be deposed on April 2, 2010 at the offices of
19 Munger, Tolles & Olson, LLP, 560 Mission Street, 27th Floor, San Francisco, CA 94105-2907,
20 beginning at 9:00 a.m.

21 Dated: March 11, 2010

Respectfully submitted,
MUNGER, TOLLES & OLSON LLP
GLENN D. POMERANTZ
KELLY M. KLAUS
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25 By: /s/ Seth Goldman
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27 Attorneys for WMG

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